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No. 80-1891

IN THE

Supreme Court of the United States

October Term, 1980

UNITED MINE WORKERS OF AMERICA, and DISTRICT NO. 5 OF THE UNITED MINE WORKERS OF AMERICA and ESTEL TAYLOR,

Petitioners,

v.

KERRY COAL COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Only one question need be reached to determine whether the instant Petition should be denied:

Should this Court review a case in which none of the requirements of Rule 17 of the Rules of the Supreme Court are present, which can be sustained upon adequate and independent state law grounds, and which only raises factual contentions, primarily going to credibility, which were unanimously rejected by the jury, by the trial court in reviewing the jury's finding of facts and by the Court of Appeals?

The instant Petition raises a total of three grounds for writ of certiorari all resolved by the jury and the Courts below in favor of the Respondent and none of which can be answered unless the Court answers the foregoing question in the affirmative. In that event the additional questions presented for review are as follows:

1. Was there a complete absence of probative facts to support the jury's finding that Petitioner United Mine Workers of America (the "International") violated Section 8(b)(4)(i) and (ii) of the National Labor Relations Act?

2. Was there a complete absence of probative facts to support the jury's finding that an object of Petitioner United Mine Workers of America, District 5's ("District 5") actions was to force Respondent to cease doing business with other persons?

3. Was there a complete absence of probative facts to support the jury's verdict on damages on both the federal and pendent state law claims against Petitioners International, District 5 and Estel Taylor?

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COUNTERSTATEMENT OF THE CASE

A. Procedural History.

On January 31, 1978, Plaintiff-Respondent Kerry Coal Company ("Kerry Coal" or "Respondent") commenced a civil action pursuant to Section 303 of the Labor-Management Relations Act ("LMRA"), 29 U. S. C. § 187, alleging, *inter alia,* that Defendants-Petitioners International and District 5 violated Section 8(b)(4) of the National Labor Relations Act ("NLRA"), as amended, 29 U. S. C. § 158(b)(4), and that Defendants-Petitioners International, District 5, and Taylor, and Defendants Gary Ashton ("Ashton") and Brian Short ("Short") tortiously interfered with Kerry Coal's contractual and business relationships during the United Mine Workers' ("U. M. W.") nationwide work stoppage from December 6, 1977 through March 27, 1978. The claim for tortious interference was pendent to Respondent's federal claim and was governed by Pennsylvania law.

Trial commenced on September 17, 1979. On October 10, 1979, after 16 days of trial, the case was submitted to the jury. On October 11, the jury returned a verdict of $1,200,000 in compensatory damages against Petitioners International, District 5 and Taylor and Defendants Ashton and Short. The jury's Special Interrogatories found the International and District 5 liable for violating Section 8(b)(4) and found Petitioners International, District 5 and Taylor and Defendants Short and Ashton liable under Pennsylvania law for interfering with Kerry Coal's business and contractual relationships. [2a-6a] [1]

1. Citations to pages 1a *et seq.* are citations to the Appendix to the Instant Petition.

On October 19, 1979, Respondents International, District 5 and Taylor filed motions for judgment n.o.v. and a new trial. On January 14, 1980, they filed a single brief in support of their post trial motions and a "Supplemental Motion for a New Trial" asserting four grounds not previously raised and waived.

On February 8, 1980, argument was held on Petitioners' post trial motions. On March 25, 1980, the Trial Court, per the late Honorable Daniel J. Snyder, Jr., in a written opinion denied Petitioners' motions for judgment n.o.v. and new trial. [Appendix A to Petition for Certiorari] An Appeal to the United States Court of Appeals for the Third Circuit followed.

Argument was held on October 14, 1980 and on January 8, 1981 the Court of Appeals, per the Honorable John J. Gibbons, Circuit Judge, held that the trial court did not err in denying Petitioners' post-trial motions and there was sufficient evidence to support the jury's verdict as to all Defendants on both the Federal and pendent claims. [Appendix C to Petition for Certiorari] The Third Circuit unanimously denied Petitioners' Motions for Rehearing and Rehearing *En Banc* on February 9, 1981. [Appendix G to Petition for Certiorari] On May 8, 1981, 88 days after the denial of the Motion for Rehearing and Rehearing *En Banc,* Petitioners International, District 5 and Taylor filed the instant Petition.

B. Statement of the Facts.

Respondent Kerry Coal was at all relevant times an independent, non-union surface coal mining company shipping its coal by rail and truck to industrial and domestic customers in Pennsylvania and Ohio. [7a] Kerry Coal had no contract with Petitioners. Petitioners admitted they were not attempting to organize Kerry Coal. Kerry Coal was operating five mine sites in Butler, Beaver and

Lawrence Counties, Pennsylvania, located within District 5. [7a] District 5's President Antal assigned Petitioner Taylor, a District 5 Executive Board Member, to coordinate strike activity in the area which included Respondent Kerry Coal's mines. [7a]

Petitioners conducted a pervasive campaign of violence and intimidation against independent, non-U. M. W. coal operations in District 5 during the 1977-78 strike. Respondent Kerry Coal was a specific target of this campaign. As a smokescreen for this illegal activity, prior to the start of the strike District 5 President Antal wrote indiscriminately to all non-U. M. W. mines in District 5 charging that they failed to meet area wage and benefit standards. In fact, Antal admitted at trial that he knew nothing about Respondent's wages and benefits, and admitted having no specific knowledge of the wages and benefits of any of the over 100 independent, non-U. M. W. mines to which he wrote. [9a]

At this same time, Antal asked International President Miller to send former International Director of Organizing Thomas Pysell to Western Pennsylvania. [7a] Pysell was then joined by International Organizer Jay Kolenc. Kolenc's expense vouchers show that, beginning on November 25, 1977, he and Pysell appeared at independent, non-union mines. Kolenc was a harbinger of violence. Wherever he went trouble followed. Kolenc remained in the area until January 21, 1978, allegedly leaving Pennsylvania just hours before Respondent Kerry Coal's heavy mining equipment was destroyed. [8a]

From the time Kolenc arrived in Pennsylvania, he was in constant contact with District 5 Board Members. [8a] Kolenc's expense vouchers show several meetings with District 5 officers. [8a] The telephone records of Petitioner Taylor, who Antal placed in charge, show many calls to Kolenc, beginning on the strike's first day, December 6, 1977. [8a]

President Antal called a November 30, 1977 meeting of the District 5 Executive Board to prepare strike guidelines for "picketing" at independent, non-union mines. [9a] District 5 paid these "pickets" $42,833 to shut down non-union operations and stop the flow of non-union coal to the market. District 5 Executive Board members authorized and paid vouchers for such violent "picket" activities as stopping coal trucks, following trucks, shutting down strip mines and forcing consumers of coal to cease using the product. [64a]

In a transparent attempt to avoid implicating District 5, Antal appointed his crony, former U. M. W. local President Michael Encrapera, to set up the District 5 Coal Miners Legal Defense Fund to pay the criminal fines and attorneys of arrested U. M. W. members. Checks made out on their face to the International, District 5 and the District 5 Strike Fund were diverted to Encrapera's fund. [16a-18a] President Antal and his District 5 Executive Board exercised dominion and control over this money. [20a, 21a] Encrapera was their rubber stamp, repeatedly ordered by Antal and other District 5 Executive Board Members to "take care of" the criminal fines and legal fees of arrested District 5 members. [20a, 21a]

Although Kerry Coal had nothing to do with the U. M. W.'s economic strike against union mines, it was immediately attacked by Petitioners. Between December 6 and 12, 1977, Vernon Kerry, Respondent's President, observed roving U. M. W. pickets around his mines. [10a] District 5 vouchers admit that Respondent Taylor and Defendant Short were in "roving bands" of pickets near Kerry Coal. On December 7, the very first day of the strike, Taylor and Short led a 5-car caravan of 16 roving pickets on a 222-mile trip near Kerry Coal. [10a-11a] On the morning of December 12, Mr. Kerry received C. B. radio reports of violence at a neighboring non-union competi-

tor's mine site, the Veon mine. Both Defendant Short and Respondent Taylor were at Veon. At trial, both Short and Taylor admitted awareness of the violence at Veon. Fearing for the lives of his employees and the safety of his property, Mr. Kerry ceased operations from December 13 to December 20, 1977. [11a]

In response to several calls for coal, Respondent Kerry Coal resumed mining operations on December 20, 1977. [11a] However, Petitioners' acts of intimidation began again. Roofing nails were strewn across the entrances of Kerry Coal's sites. [11a] On December 27, 1977, Defendant Ashton and his friend, U. M. W. member Beachem, immediately after threatening Kerry Coal's employees and truck drivers, threatened Mr. Kerry that if he did not shut down, they would bring in 200 men to wreck his equipment. Beachem added, "we can do this with one phone call." [11a] Ashton, who lived next to the Franklin Township site, where Kerry Coal's equipment was destroyed, disrupted Kerry Coal's shipments to its customers by picketing Kerry's railroad crossing with a District 5 economic strike sign—"UMW ON STRIKE—NO CONTRACT—NO WORK." Whenever a train came to pick up coal, it was forced to leave empty. [11a] Respondent Taylor then authorized and District 5 paid for all of Ashton's activities since the strike began, including his stopping the trains at Respondent's rail siding.

Ashton wanted to completely shut down Kerry Coal's operations. On the very same day he and Beachem threatened Mr. Kerry that they would close Kerry Coal and destroy its equipment with a single phone call, Ashton called U. M. W. member Lytle, who promised help. [12a] Ashton, Beachem and Lytle then met with International Organizer Kolenc. Kolenc went to Ashton's home next to Kerry Coal's mine site and advised him how to shut down Kerry Coal. [12a, 65a] Kolenc and Ash-

ton then surveyed Kerry Coal's mining operation. [66a] Kolenc directed District 5 Executive Board Member Taylor to call Ashton that same day to finalize the picketing. [65a] Taylor did as ordered and arranged a second meeting near Kerry Coal's Franklin Township mine site.

Kolenc, Ashton, Taylor, Short and other District 5 members met and finalized the picket line at Kerry Coal's Franklin Township rail siding, where Ashton had previously stopped trains and where Kerry Coal's equipment was later destroyed. Because Kerry Coal normally shipped 80% of its coal by rail, Kerry Coal's railroad siding was the most vulnerable site. [11a]

International Organizer Kolenc participated in the attack on Kerry Coal and was in the words of the Third Circuit "an encouraging presence." [65a] After the meeting with Taylor, Kolenc and Ashton "scouted" Kerry Coal's operations. [66a] Kolenc was so enthusiastic that on the first day of picketing he arrived first, even before Taylor. Defendant Ashton and Respondent Taylor admitted seeing Kolenc at the picket line several times. Kolenc threatened Kerry Coal's employees, encouraged his fellow picketers and served as their spokesman, even negotiating with the police on their behalf. Even after the picket line was withdrawn, Kolenc remained in constant contact with Respondent Taylor, District 5's coordinator of picketing at Kerry Coal's operations.

On January 20, 1978, just one day before Kerry Coal's heavy mining equipment was destroyed, Taylor, Short and other District 5 members returned to Kerry Coal's mine site. [66a] The admitted sole purpose of their 130 mile trip, paid for by District 5, was to see if Kerry Coal was operating. They then immediately met with Kolenc to plan the destruction of Kerry Coal's equipment. [13a, 66a] After meeting with Taylor, Short and the others, International Organizer Kolenc mysteriously and "abruptly" checked out the Beaver Falls Holiday Inn and

allegedly left Pennsylvania just hours before Kerry Coal's equipment was destroyed. [66a] At 7:18 P. M. on the night of January 21, 1977, telephone records show that Taylor called Ashton at Ashton's home overlooking Kerry Coal's site. [36a]

In the early morning hours of January 22, 1978, Kerry Coal's heavy mining equipment was destroyed. When Mr. Kerry was called to the site that morning, he observed extensive damage to his new drag line, three bulldozers, a pan scraper and a fuel truck. Gauges and controls were smashed and air cleaners broken. Windows on the equipment were broken, the turbochargers smashed, fuel lines cut and two-way radios destroyed. Lines on the fuel tanks were cut allowing fuel to run out. Metal bars were driven by sledges through radiators. Gauges and controls were smashed and air cleaners broken. In addition, foreign substances, such as sand and mothballs were placed in fuel tanks of the equipment. Radiators were completely filled with sand and dirt. [13a-14a] At 9:26 A. M., on the morning of January 21, 1977, Taylor once again called Ashton at home. Telephone records prove that their conversation lasted six minutes, although at trial both denied the phone call was ever made. [36a-37a]

Mr. Kerry, an experienced hunter and tracker, observed distinctive tire tread marks in the snow which he identified as coming from Defendant Short's Dodge Ramcharger. Mr. Kerry recognized Short's vehicle's tire tracks, having seen them while Short was previously at Kerry Coal. When Mr. Kerry accused Short of "being seen last night," Short significantly did not deny it. He merely rejoined, "I don't think so." Short then immediately replaced a virtually new set of tires on this vehicle. [14a, 37a] On January 26, after learning from Short that Mr. Kerry said they had been seen, Taylor travelled 130 miles

to the area of Kerry Coal to check with a "farmer" whether he and his cohorts had indeed been seen. [15a-16a]

Respondents' attack on Kerry Coal did not end with the destruction of its equipment. On January 25, 1978, twelve carloads of U. M. W. pickets mobbed and blockaded Kerry Coal's tipple. Mr. Kerry called the State Police, but before their arrival, men came into Kerry Coal's office, identified themselves as U. M. W. members, and ordered Mr. Kerry to stop shipping industrial or electrical utility coal. Mr. Kerry was frightened and agreed to do so:

> It was a wise decision on my part because within five minutes there was a caravan came past my office in a show of force. There were some 80 cars in the caravan in addition to the cars that were already at my site.

[15a]

When the State Police arrived, the "pickets" had gone. The police told Mr. Kerry that they could not protect them and before the caravan comes back he should get his employees out of there. Kerry ordered his men to leave.

Kerry Coal's trucks were continually followed and harassed throughout the strike. When Kerry Coal attempted delivery to its customer, St. Joe Mineral Company ("St. Joe"), U. M. W. members swarmed around the trucks and plant gates, threw rocks and damaged Kerry Coal's trucks. Mr. Kerry and his drivers barely escaped under police escort. St. Joe then stopped orders from Kerry Coal. Petitioners attempted to destroy evidence and conceal from the jury their illegal activity against Kerry by crossing out "St. Joes" on vouchers paid by District 5 to its members. [15a, 67a]

Kerry Coal suffered damages to its business and property as a result of Petitioners' actions. Kerry Coal was forced to close its mining operations in December, 1977, because of nearby U. M. W. violence. Petitioner District 5 members intimidated Kerry's employees; stopped trains transporting Kerry's coal and prevented Kerry from shipping its coal to utilities; intimidated truckers; hampered truck shipments by throwing roofing nails across the entrance to Kerry's Franklin Township site; caused several of Kerry's retail customers to stop their orders; destroyed Kerry's mining equipment; and forced Kerry to incur expenditures for security guards, lost man-hours (production employees taken away from normal assignments and assigned to repair and guard equipment); and obtaining a state court injunction to prevent further U. M. W. illegality.

The Petitioners' reign of terror was effective. The strike was a period of tremendous sales opportunities for Kerry Coal. With unionized mines not functioning, demand for coal far exceeded supply. Mr. Kerry testified that from the very beginning of the strike, "my phone was ringing off the hook." However, Petitioners' illegal actions forced shutdowns, stopped trains from picking up coal, and deterred trucks from transporting Kerry's coal. Moreover, the message was effectively delivered to customers, such as St. Joe, that if they bought Respondent's coal, they would face U. M. W. violence. Kerry Coal was unable to meet the demand for coal, solely because of Petitioners' interference.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision, affirming the jury's verdict on both the federal and pendent state claims and the trial court's extensive post-trial review of the sufficiency of the evidence, follows long-standing and controlling precedent, does not conflict with decisions of this Court or any Court of Appeals, does not present any issue worthy of review by this Court and may be sustained upon adequate and independent state law grounds.

A. There Are Adequate and Independent State Law Grounds to Sustain the Judgment.

Petitioners International, District 5 and Taylor seek to have this Court review the decision of Third Circuit affirming the trial court's denial of Petitioners' post-trial motions. Even if Petitioners were to prevail on their arguments on the federal claim, the decision of the Third Circuit holding there was sufficient evidence to support the jury's verdict on the state law claim of tortious interference would stand on adequate and independent state law grounds.

This Court will not and does not review judgments of the state's highest courts which may be supported by adequate and independent state law grounds. *See Herb v. Pitcairn*, 324 U. S. 117, 125 (1954); 12 J. W. Moore, *Moore's Federal Practice* § 511.01, at 8-65 (2d ed. 1980). Moreover, it is entirely inconsistent with Rule 17 of the Rules of the Supreme Court to review the decision of the Third Circuit that under Pennsylvania law there was adequate evidence to support the jury's verdict on the pendent claim of tortious interference with business relations.

Accordingly, for this reason alone the instant Petition must be denied.

B. The Third Circuit Correctly Decided That There Was Sufficient Evidence to Support the Jury's Finding of Liability Against Petitioner International.

Petitioner International's contention that the Third Circuit's finding of sufficient evidence to sustain the verdict against it is in conflict with the decisions of other Courts of Appeal and this Court is based on inaccurate, incomplete and misleading statement of the record below. It is nothing more than an attempt to restate the same arguments which were rejected by the jury and the two courts below in carefully reviewing the jury's findings of fact.[2]

The jury's finding that the International through its agent, Jay Kolenc, "authorized, ratified and participated" in the interference with Respondent's business and property is fully supported by the record.

Petitioner's suggestion that the decision of the Third Circuit is in conflict with this Court's decision in *Carbon Fuel Co. v. UMW*, 444 U. S. 212 (1979) and the decisions of the Sixth Circuit in *Buckeye Power, Inc. v. Utility Workers Union*, 607 F. 2d 759 (6th Cir. 1979), and *Steelworkers v. Lorain*, 616 F. 2d 919 (6th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3863 (U. S., May 19, 1981) is patently incorrect.

In *Carbon Fuel Co. v. UMW, supra*, this Court held that where there is no evidence presented in the district court that the International Union instigated, supported, ratified or encouraged an illegal work stoppage, it could not be held liable for breach of a collective bargaining agreement under section 301 of the LMRA, 29 U. S. C. § 185. *Carbon Fuel Co. v. UMW, supra* at 218. This finding is contrasted with the overwhelming evidence of

2. There has been a long-standing practice of this Court not to review findings of fact which have been reviewed by two courts. *See, e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 275 (1949), *adhered to on reh.*, 339 U. S. 605 (1950).

Kolenc's extensive participation in and leadership of Petitioners' illegal activity directed at Respondent Kerry Coal.

Similarly inapposite are *Buckeye Power, Inc. v. Utility Workers Union*, 607 F. 2d 759 (6th Cir. 1979) and *Steelworkers v. Lorain*, 616 F. 2d 919 (6th Cir. 1980).

In *Buckeye*, the Sixth Circuit affirmed the district court's refusal to find a national labor union liable under section 303 of the LMRA, 29 U. S. C. § 187, because there was no evidence that the union authorized, encouraged or ratified illegal activity. *Buckeye Power, Inc. v. Utility Workers Union, supra* at 761.

Similarly, in *Steelworkers v. Lorain, supra*, the Sixth Circuit refused to hold a labor organization liable under section 301 of the LMRA, 30 U. S. C. § 185, for an alleged breach of a no strike clause in a collective bargaining agreement. The *Lorain* court held that there was no implied obligation on the part of the labor organization to take whatever actions were necessary to procure a termination of the illegal work stoppage. The court held that for a labor organization to be held liable it must be shown that the illegal activity was ratified, authorized or participated in by the labor organization. The *Lorain* court also held that the district court's conclusion that the union's failure to act to end the work stoppage or to discipline the strikers and to discuss the substance of the employees' grievances which precipitated the illegal strike was clearly erroneous. 616 F. 2d at 922-23.

The actions of the unions in *Buckeye* and *Lorain* are in sharp contrast with the activities of International Organizer Jay Kolenc instigating, participating and encouraging the illegal activity directed at Kerry Coal. In its review of the record the district court found that Kolenc provided the "know-how" to plan and implement Petitioners' campaign of interference with Respondent Kerry

Coal. Petitioner International ignores the fact that the jury was correctly instructed on the burden of proof for each count. Petitioner International did not and does not object to any statement of the law by either the trial court or Third Circuit or the issues of the appropriate burden of proof or the requirements for finding the existence and scope of an agency relationship.[3] Rather its sole contention is that this Court should supercede the jury by reviewing the evidence; making judgments on the credibility of witnesses; and sitting as the finder of fact. This is clearly not the proper role of this Court or any appellate court.

C. There Was Sufficient Evidence to Support the Jury's Finding That an Object of Petitioner District 5's Activity Was Forcing Respondent to Cease Doing Business With Other Persons.

Petitioner District 5 argues that both the Third Circuit and trial court did not consider whether there was sufficient evidence that District 5 had as an object of its conduct the type of interference prohibited by Section 8 (b)(4) of the NLRA, 29 U. S. C. § 158(b)(4). It should

3. In its instant Petition the International erroneously contends it would need actual knowledge of the acts of its agent Kolenc to be liable under Section 303 of the LMRA, 29 U. S. C. § 187. This is, of course, wholly inconsistent with Section 301(b) and (e) of the LMRA, 29 U. S. C. § 185(b) and (e) which provides in pertinent part:

> (b) Any labor organization/shall be bound by the acts of its agents. . . .
>
> . . .
>
> (e) For the purposes of this section in determining whether any person is acting as an "agent" of another for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

be noted that Petitioner does not contend that such evidence was lacking, only that the issue was not addressed by the court below.

This contention is easily disposed of.

First, District 5 has belatedly raised this issue for the first time. It neither raised in its post-trial motions or on its appeal to the Third Circuit the sufficiency of the evidence to support the jury's finding that the object of its activity was to interfere with Respondent. It is a matter of black-letter law that this Court will not consider contentions which have not been raised below. *See Singleton v. Wulff*, 428 U. S. 106, 120 (1976); *Youakim v. Miller*, 425 U. S. 231, 234 (1976) (Per Curiam), *California v. Taylor*, 353 U. S. 553, 557 n. 2 (1957); *Lawn v. United States*, 355 U. S. 339, 362-63 n. 16 (1958).

Even if Petitioner District 5 raised this issue below, it is wholly without merit.

The jury specifically found an illegal object in its Answer to the Special Interrogatories:

> 5. Was an object of the aforementioned conduct by District No. 5 to require or force the employer, Kerry Coal Company, to cease doing business, or the trucking companies hauling Kerry Coal, or the Railroad to cease processing, transporting, or handling Kerry Coal?
>
> Answer Yes.
>
> 11. Were these acts of United Mine Workers, District No. 5, done with an object, purpose, or intent to require or to force Kerry Coal Company to cease doing business with any other person?
>
> Answer Yes.

[3a-4a]

The jury's finding was supported by the record. District 5's activity was not an "antiseptic information

campaign" as Petitioner District 5 disingenously suggests. "Pickets" used the U. M. A.'s traditional economic strike "No Contract—No Work" signs and were not picketing to publicize area wages. Around-the-clock "pickets" at a rail siding disrupted Respondent's coal shipments. Equipment was destroyed to force Respondent to cease operations. District 5 paid pickets to stop trucking and shut down strip mines. The District Court in reviewing the evidence found:

> The overwhelming evidence however indicated that the District, with know-how provided by the International Organizers, planned and implemented the campaign to interfere with the production and sale of non-union coal during the strike, including Kerry coal, and that Kerry Coal's damages resulted therefrom.

[34a]

The paucity of Petitioner District 5's argument that Respondent failed to adduce evidence of an illegal object was conclusively demonstrated by the Third Circuit:

> On November 30, 1977 the Executive Board of District 5 met and formally decided to conduct what it referred to as "informational" picketing at non-union mining operations during the anticipated strike. The Board authorized payment from District 5 funds to compensate picketers. *Vouchers for such payments contained such notations such as "made check on these strips in the afternoon after having pickets shut them down" (App. at 1970) and "Shut down trucking cos."* (App. at 1966), from which the jury could infer that the picketing was not intended as area standards informational picketing, but was for the purpose of interrupting production at the non-union mines. (Emphasis added)

There was overwhelming evidence to support the jury's finding that District 5's activities were for the purpose of shutting off the supply of non-union coal during the work stoppage. Petitioner District 5's argument that there was insufficient evidence to support this inescapable conclusion is wholly without support.

D. The Decision of the Third Circuit With Respect to Damages on the Federal and Pendent Claims Is Consistent With Its Previous Decisions and Does Not Merit Review by This Court.

The last issue raised by Respondents is an alleged inconsistency between the ruling of the Third Circuit in its decision with respect to damages between the instant case and its decision in *William B. Tanner Co. v. WIOO, Inc.*, 528 F. 2d 262 (3d Cir. 1975). The Petitioners would seek to have this court review not only the Third Circuit's decision upholding the adequacy of the evidence to sustain the jury's verdict on damages on the federal count but also on the pendent count under Pennsylvania law.[4]

Petitioners' contention that the jury's damage award could not be sustained under *Tanner* was rejected by both the Third Circuit and the trial court.

Petitioner's reliance upon *William B. Tanner Co. v. WIOO, Inc.*, 528 F. 2d 262 (3d Cir. 1975) is totally misplaced. *Tanner* is readily distinguishable from the instant case on its facts. In *Tanner*, the Third Circuit rejected the

4. This Court lacks jurisdiction to review the final judgment of a state's highest court which may be supported by adequate and independent state law grounds. *See Herb v. Pitcairn*, 324 U. S. 117, 125 (1954); 12 J. W. Moore, *Moore's Federal Practice*, § 511.01, at 8-65 (2d ed. 1980). Similarly, it is wholly inconsistent with Supreme Court Rule 17 for this Court to review the decision of the Third Circuit with respect to proper measure of damages under Pennsylvania law.

damages because there was no evidence in the record on which a computation of damages could be based. In the instant case, Respondent clearly established the value of its lost sales and profits by relying on its actual sales history and business records in evidence during a base period within the strike.[5] For this period, Respondent's actual sales tonnage and actual sales prices were utilized in the calculations. Given the testimony concerning the high demand for coal throughout the strike and Kerry Coal's use of its actual sales data in computing lost profits, *Tanner* is entirely inapposite.

The evidence or damages was succinctly summarized by the Third Circuit:

> "The jury was presented with a reasonable basis from which it could find both the amount of Kerry Coal's lost sales during the national bituminous coal strike and the causal relationship between those lost sales and defendants' activities . . . ."

[77a]

Petitioners' attempt to have this Court exercise its power of supervision because the courts below rejected their distorted reading of the *Tanner* decision. However, their argument ignores the evidence in the record and only reargues factual contentions which were made to and rejected by the jury.

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5. Respondent based its damage calculations upon a method approved by courts in suits under Section 303 of the LMRA, 29 U. S. C. § 187. *See, e.g., Blue Diamond Coal Co. v. UMW*, 436 F. 2d 551 (6th Cir. 1970), *cert. denied*, 402 U. S. 930 (1971). Petitioners did not challenge below or here the methodology employed by Respondent or that the categories of damages—lost profits, lost man hours, lost interest income or out-of-pocket expenses—were compensable. *See Kerry Coal Co. v. UMW*, 637 F. 2d 957, 966 (3d Cir. 1981). [77a]

CONCLUSION

The instant Petition improperly seeks to have this Court review factual determinations made by a jury which were carefully reviewed by both the trial court and the Third Circuit and make judgments as to credibility of witnesses. The Petition further seeks to have this Court review determinations of state law made by the Third Circuit. None of these grounds are appropriate for review by the Supreme Court under Supreme Court Rule 17. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix.

STATUTES INVOLVED

Relevant Section of the National Labor Relations Act. Section 8(b)(4), 29 U. S. C. § 158(b)(4).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative

of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or prod-

ucts are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Relevant Sections of the Labor Management Relations Act of 1947.
Section 301(b) and (e), 29 U. S. C. § 185(b) and (e).

* * *

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

* * *

(e) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 303, 29 U. S. C. § 187.

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Supreme Court Rule 17. Considerations Governing Review on Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.